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Mr. Daniel Hoffman
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Ithaca, NY 14850-5614



American Chemistry Council - New York
Associated Builders and Contractors –
Empire State Chapter
Associated General Contractors
of New York State
Business Council of New York State, Inc.
Construction Contractors Association
of the Hudson Valley
Construction Industry Council of
Westchester and Hudson Valley, Inc.
Greater Binghamton
Chamber of Commerce
Hartz Energy Capital, LLC
Hometown Energy Group
International Union of
Operating Engineers
Joint Landowners Coalition
of New York, Inc.
Latino National Republican Coalition
of New York State
National Federation of Independent
Business (NFIB) New York
National Hispanic Assembly of
Orange County
National Hispanic Construction
Association
New York State Black
Chamber of Commerce
New York State Economic
Development Council
Northeast Regional Council
of Carpenters
Steuben County Landowners Coalition
Southern Tier Economic Growth

Dear Mr. Daniel Hoffman:

Many communities in New York have been approached about instituting temporary moratoriums on natural gas development. It's important to note that moratoriums and bans passed by some municipalities may impose significant legal, technical and financial costs on already burdened local governments and taxpayers in an attempt to regulate a complex industrial activity, in a manner that ultimately may be unenforceable.

Three decades ago, New York's oil and gas industry was governed by a regulatory structure that degenerated into a chaotic and tangled system as municipalities across the state each began enacting their own local regulatory initiatives to govern the process of oil and gas extraction.

This patchwork of regulation created a litany of problems, including:

1. Safety concerns resulting from untrained local staff going onto well sites;
2. Local municipalities being forced to absorb significant and often unsustainable costs to hire professional petroleum engineering staff;
3. Inconsistent local regulation resulting in differing requirements for drilling unrelated to geology;
4. Financial insecurity at both the local and state levels;
5. Conflicts between municipal boundaries and setbacks; and
6. Exorbitant local taxation.

As a result, the New York Oil, Gas and Solution Mining Law was amended in 1981 to include the following supersedure provision in ECL §23-0303(2):

The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.

This amendment was enacted with the clear understanding that the supersedure clause extinguished the right of municipalities to regulate any aspect of oil and gas development including the right to zone oil and gas. Furthermore, there was never any intent to allow a local government to extinguish the mineral rights of any landowner by zoning out oil and gas development. Rather, ECL §23-0303(2) was intended to strengthen the rights of landowners to recover their subsurface minerals, or have others do so for them, under carefully applied state regulation, not any local regulation.

Furthermore, ECL Article 23-0301 declares it to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste, to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected.

It seems evident that bans on oil and gas development passed by municipalities conflict with the state's public interest. There are two cases pending in the state Supreme Court, Cooperstown Holstein Corporation vs. Town of Middlefield and Anschutz Exploration Corporation vs. Town of Dryden and Town of Dryden Town Board. These cases will define the parameters of ECL §23-0303(2).

Recent decisions in Dryden and Middlefield have brought the implications of ECL §23-0303(2) back to the forefront of the debate over regulation of natural gas development. However, these rulings mark the beginning, rather than the end of a legal process to determine the rights of local communities in addressing gas development.

First and foremost, the recent rulings will be appealed for relying on case law related to the Mined Land Reclamation Law ECL § 23-2703(2) (Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126.) which specifically allows municipalities to enact stricter zoning laws related to mining operations. ECL §23-0303(2) allows municipalities to regulate roads and taxes but it does not have the zoning exception contained in the Mined Land Reclamation Law. The courts also pointed to prohibitions in other states that denied individual projects, not all development outright as Dryden and Middlefield do. The substantial differences between the case law used to uphold these decisions, and the restrictions local communities are pursuing, will be challenged on appeal.

Second, these decisions have left unsettled exactly what type of restrictive language or action a city can take in regards to gas development. Even in the unlikely event the current rulings were upheld in their entirety, additional legal challenges over what types of activity municipalities may limit – such as pipelines, existing wells, and particular processes that are a subset of oil and gas development like hydraulic fracturing – are likely.

Finally, even if these laws are upheld, municipalities that pass bans will be subject to “takings claims”. Landowners who lose the right to market their minerals are likely to pursue claims under the Fifth Amendment to the United States Constitution which provides that private property shall not be taken for public use without just compensation.

Municipal and county governments should also be aware of General Municipal Law §239 which is intended to bring inter-community and county-wide planning and zoning considerations to the attention of neighboring municipalities and agencies having jurisdiction. General Municipal Law §239-m requires the referral of the adoption or amendment of a comprehensive plan or zoning ordinance to the county planning agency. If the county planning agency recommends modification or disapproval of a proposed zoning change, the municipality can only enact the new law by a vote of a majority plus one of all the members of the town or city board.

A growing number of municipalities in New York have been persuaded by anti-drilling activists to consider the prohibition of natural gas drilling. In the wake of the decisions in Dryden and Middlefield. Rushing to pursue these “cookie-cutter” ordinances serves no material benefit to local communities, since the entire state is waiting for the Department of Environmental Conservation to complete the SGEIS.

Bans enacted by local municipalities on natural gas development also threaten to return New York to the period of chaos that existed prior to 1981 – a period in which well sites were not properly regulated, local municipalities incurred significant costs in order to contract with qualified petroleum engineers, taxpayers were forced to pay higher taxes, and local rules on drilling were subject to change after every election cycle.

Furthermore, state regulation of the practice of oil and gas extraction does not usurp a municipality’s right to implement legitimate zoning and land use controls to govern the non-technical aspect of oil and gas development.

In fact, the DEC’s proposed regulations enumerate specific responsibilities guaranteed to local communities. Awaiting finalization of the regulations will allow communities to constructively address those areas that state law grants local control.

Issues left to local government control include topics such as aesthetics of well sites, noise pollution concerns, and trucking and transportation hours and planning. These allowances demonstrate recognition that every community has different needs, and ensure development activity does not conflict with a local community’s character.

The technical aspects of the DEC’s proposed regulations also are intended to empower local communities, by promoting transparency around all natural gas operations. Operators are required to submit the details on all additives used in the fracturing process through an online database open to the public. The state will also require a system of air and water testing before and after operations that will be open to public scrutiny. Providing open access to the information necessary to evaluate the safety and effectiveness of the industry ensures that communities have the information necessary to independently validate the efforts of state regulators and the performance of industry operators.

By statute, the DEC must act in a manner consistent with our state laws and our policies while protecting our environment. Our state’s interests are best served when the technical aspects of development are left in the hands of the experts at this agency – not thrust upon the shoulders of local community governments.

The policy implications surrounding the development of natural gas in New York State are too important to leave to heated rhetoric. A thoughtful, informed approach, like that conducted by our State leaders through the DEC review going on for nearly four years now, will ensure that legislators and regulators make the best decision to balance the protection of our precious water resources and realization of energy development benefits for our state.

If you would like more detailed legal analysis or to request alternative viewpoints to resolutions presented by paid anti-drilling activists that may subject your locality to undue costs and burdens, please feel free to contact us at 1-(866)-347-1589 or at info@cleangrowthnow.org.

Sincerely,

A handwritten signature in blue ink that reads "Scott R. Kurkoski". The signature is fluid and cursive, with the first name "Scott" being larger and more prominent than the last name "Kurkoski".

Scott R. Kurkoski, Esq.

Joint Landowners Coalition of New York, Inc.